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No. 04-1034

In the

Supreme Court of the United States

JOHN A. RAPANOS; JUDITH A. NELKIE RAPANOS; PRODO, INC.; ROLLING MEADOWS HUNT CLUB; and PINE RIVER BLUFF ESTATES, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. THE SIXTH CIRCUIT RECOGNIZED ITS CONFLICT WITH THE FIFTH CIRCUIT 1

II. *RIVERSIDE BAYVIEW* DOES NOT SUPPORT REGULATION OF REMOTE NONNAVIGABLE WETLANDS 3

III. THE REGULATION OF REMOTE NONNAVIGABLE WETLANDS RAISES SERIOUS CONSTITUTIONAL PROBLEMS 5

A. The Commerce Clause Issue Is Reviewable 5

B. The Regulation of Remote, Nonnavigable Wetlands Is Not the Regulation of the Use of Channels of Interstate Commerce 7

C. The Regulation of the Wetlands in This Case Can Only Be Sustained, If at All, as a Regulation of Activity That Substantially Affects Interstate Commerce 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

Cases

In re Needham, 354 F.3d 340 (5th Cir. 2003) 5

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 6

Rice v. Harken Exploration Co.,
250 F.3d 264 (5th Cir. 2001) 5

Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (*SWANCC*), 531 U.S. 159 (2001) 4-8, 10

United States v. Lopez, 514 U.S. 549 (1995) 7

United States v. Morrison, 529 U.S. 598 (2000) 9-10

United States v. Riverside Bayview Homes, Inc.,
474 U.S. 121 (1985) 3-4, 8

Yee v. City of Escondido, 503 U.S. 519 (1992) 5

Miscellaneous

Adler, Jonathan H., *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*,
29 Envtl. L. 1 (1999) 10

Definition of "Ditch" is Muddy at Best, Cindy Skrzycki; Washingtonpost.com, Tuesday, Mar. 29, 2005; http://www.washingtonpost.com/wp-dyn/articles/A8362-2005Mar28.html (last visited Apr. 8, 2005) 2

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I

THE SIXTH CIRCUIT RECOGNIZED ITS CONFLICT WITH THE FIFTH CIRCUIT

Respondent United States claims the Sixth Circuit decision in this case does not directly conflict with the decisions of any other court of appeals. Brief for the United States in Opposition (Opposition) at 16. But this contradicts the Sixth Circuit's understanding of its own decision:

> The Fifth Circuit requires that non-navigable water be "truly adjacent to navigable waters" in order to qualify for CWA [Clean Water Act] jurisdiction. The majority of courts, including this one, however, construe *Riverside Bayview* and *SWANCC* to hold that, while a hydrological connection between the non-navigable and navigable waters is required, there is no "direct abutment" requirement.

Appendix (App.) at A16.

That the Sixth Circuit viewed this conflict as real and substantial is apparent from the pains the court took to detail its disagreement with the Fifth Circuit. *See* App. at A14-15. But the court went further, repeatedly venting its frustration over the difficulty the courts have had ascertaining what "adjacent" means and defining the necessary hydrological connection to establish federal jurisdiction. *See* App. at A7-A8. According to the Sixth Circuit, the problem, and obviously the solution, lies with this Court: "Unfortunately, the two leading Supreme Court cases on the reach of the CWA have done little to clear the muddied waters of CWA jurisdiction." *Id.* at A8.

But review in this case is required not only to resolve the conflict in the circuits, but also to address the need of the implementing agencies—not to mention the regulated public—for a clear statement of authority. A recent report from the General Accounting Office documented the inconsistent

jurisdictional determinations within the Army Corps of Engineers that result from a lack of clear judicial guidance on the scope of the CWA. *See Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction*, GAO-04-297 (Feb. 27, 2004).

In that report, the GAO identified numerous discrepancies related to jurisdictional determinations for adjacent wetlands, like those at issue in this case. *See id.* at 2. And, as if to underscore the immense public interest in a resolution of this problem, the GAO also reported that when the Corps announced it would consider a rule making to clarify its CWA jurisdiction in 2003, the agency received approximately 133,000 comments, "representing widely differing views." *Id.* at 3. But that proposed rule making was withdrawn.

Now, the confusion is even touted in the popular press:

> "There is just pandemonium out there, but that is by design," said Julie Sibbing, senior program manager for wetlands policy for the National Wildlife Federation. "No one knows what is protected and what isn't."
>
> The chief of the regulatory program for the Corps of Engineers agreed that things aren't too clear.

Definition of "Ditch" is Muddy at Best, Cindy Skrzycki; Washingtonpost.com, Tuesday, Mar. 29, 2005; http://www.washingtonpost.com/wp-dyn/articles/A8362-2005Mar28.html (last visited Apr. 8, 2005).

What is clear, however, is that this case raises an important federal question over which the appellate courts are split and that review by this Court is long overdue.

II

RIVERSIDE BAYVIEW DOES NOT SUPPORT REGULATION OF REMOTE NONNAVIGABLE WETLANDS

All parties, and the Sixth Circuit, agree that this Court requires a "significant nexus" between an "adjacent" wetland and a navigable water to justify federal jurisdiction under the CWA. The Sixth Circuit held in this case, however, that a wetland *twenty miles away* was "adjacent" to a navigable water and *any* "hydrological connection to navigable waters" establishes a "significant nexus:"

> What is required for CWA jurisdiction over "adjacent waters," however, is a "significant nexus between the wetlands and 'navigable waters,'" . . . which can be satisfied by the presence of a hydrological connection.

See App. at A16. *See also id.* at A21 (citation omitted).

Respondent argues that conclusion is supported by *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). Opposition at 13-14. But that case cuts the other way. When Riverside Bayview placed fill material in a low-lying marshland, the Army Corps sought an injunction from the district court. That court found the marshland was "adjacent" to a navigable water because the area was characterized by saturated soil conditions and wetland vegetation that extended all the way "to Black Creek, a navigable waterway." *Riverside Bayview*, 474 U.S. at 131.

This Court relied on that determination and expressly held that Riverside Bayview must obtain a section 404(a) permit "*[b]ecause* respondent's property is part of a wetland that *actually abuts* on a navigable waterway." *Id.* at 135 (emphasis added).

The reason for this Court's holding in *Riverside Bayview* was fully explained in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* (*SWANCC*), 531 U.S. 159 (2001): "We found that Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands 'inseparably bound up with the "waters of the United States.' " *Id.* at 167 (quoting *Riverside Bayview*, 474 U.S. at 134). Also, "[i]t was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*." *Id.*

Riverside Bayview thus defined "adjacent" to mean abutting and "significant nexus" to mean inseparably bound up. That case does not support the conclusion of the court below, therefore, that the term "adjacent" can mean a distance of twenty miles and that a "significant nexus" can be established by any hydrological connection.

But Respondent doggedly argues the real significance of *Riverside Bayview* lies in a remote footnote. *See* Opposition at 13-14. Footnote 9, says Respondent, gives the government authority to regulate wetlands that have no significant connection to navigable waters, like the remote wetlands in this case. *Id.* at 14. The problem with this argument is that this Court expressly stated it did not address this type of case in *Riverside Bayview*: "Indeed, [in that case] we did not 'express any opinion' on the 'question of the authority of the Corps to regulate discharges of fill material into wetlands that are *not adjacent* to bodies of open water.'" *SWANCC*, 531 U.S. at 167 (emphasis added). But this Court *did* express an opinion on that question in *SWANCC*:

> In order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to

> ponds that are *not* adjacent to open water.[1] But we conclude that the text of the statute will not allow this.

Id. at 168.

Review in this case is necessary, therefore, to address the overbroad interpretation that the Sixth Circuit, and other courts, have given to federal jurisdiction under the CWA.

III

THE REGULATION OF REMOTE NONNAVIGABLE WETLANDS RAISES SERIOUS CONSTITUTIONAL PROBLEMS

A. The Commerce Clause Issue Is Reviewable

Relying on *Yee v. City of Escondido*, 503 U.S. 519 (1992), and two other cases, Respondent argues the Commerce Clause issue is not reviewable in this Court because it was not raised below. Opposition at 20. But these cases are unavailing. They held only that this Court may choose not to review issues that: (1) were not decided below; (2) or were not raised below; or (3), were not fairly included in the questions presented in the petition for certiorari. *See Yee* 503 U.S. at 533. The Commerce Clause issue in this case is reviewable under all three standards.

---

[1] Respondent tries to make an issue out of the term "open water," suggesting it does not mean actual navigable waters. But that position supports the need for review in this case because the Fifth Circuit, contrary to the Sixth Circuit, clearly understood "open water" to mean actual navigable waters: "under *SWANCC* 'a body of water is subject to regulation . . . if the body of water is actually navigable or adjacent to an open body of navigable water.'" *In re Needham*, 354 F.3d 340, 345-346 (5th Cir. 2003) (citing *Rice* v. *Harken Exploration Co.*, 250 F.3d 264, 269 (5th Cir. 2001)).

The Sixth Circuit found as a matter of law that: "CWA jurisdiction extends beyond traditionally navigable waters because economic activities affecting interstate commerce are susceptible to 'congressional regulation under the Commerce Clause irrespective of whether navigation, or, indeed, water, is involved.' " App. at A7-A8 (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 174 (1979). And further: "In order to invoke federal jurisdiction the wetlands must bear some connection to navigable waters or interstate commerce." App. at A8.

These findings formed the basis for the Sixth Circuit holding, at least in part. Therefore, the Commerce Clause issue raised here was decided below and is subject to review in this Court. Also, the issue was properly raised in the petition for rehearing. The Commerce Clause challenge involves a purely legal question and thus fell within the Sixth Circuit exception to the general rule that courts of appeal will not hear issues first raised on appeal. *See* App. at A21. Although Rapanos' petition for rehearing en banc was denied, the Commerce Clause issue presented in the rehearing petition was properly raised below under the Sixth Circuit exception and is subject to review in this Court.

Additionally, the Commerce Clause issue was expressly raised in the questions presented. *See* Petition for Writ of Certiorari at i.

Finally, the reviewability of the Commerce Clause issue is irrelevant to the question of whether Congress intended the CWA to reach wetlands miles removed from the nearest navigable waters. In *SWANCC*, this Court determined the regulation of nonadjacent wetlands "push[ed] the limit of congressional authority" and that fundamental principles of statutory construction demanded "a clear indication that Congress intended that result." *SWANCC*, 531 U.S. at 172. Without deciding whether the regulation of nonadjacent

wetlands actually exceeded the commerce power, this Court invalidated the government's expansive CWA regulation in *SWANCC* stating: "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Id.* at 173.

As discussed below, the application of the CWA to the wetlands in this case raises serious constitutional problems. The CWA should be read, therefore, to avoid such problems.

B. The Regulation of Remote, Nonnavigable Wetlands Is Not the Regulation of the Use of Channels of Interstate Commerce

This Court has recognized three categories of activity that Congress is empowered to regulate under the Commerce Clause. First, Congress has authority to regulate the use of the channels of interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558 (1995). Second, Congress may "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce." *Id.* And third, Congress is authorized to regulate those activities "that substantially affect interstate commerce." *Id.* at 559.

In this case, Respondent argues only the first category applies; that the government's prohibition on the filling of remote, nonnavigable wetlands constitutes the regulation of the channels of interstate commerce and is per se valid. Opposition at 23. But this is incorrect.

To determine the appropriate category, and hence the proper analysis, of a Commerce Clause enactment, this Court applies a plenary test. It looks to the statutory language. *See Lopez*, 514 U.S. at 559. If the language of the Act does not purport to regulate channels, instrumentalities, or persons or

things in interstate commerce, those categories are summarily dismissed. *Id.*

By its terms, section 404(a) applies to "navigable waters." This Court has ruled that "navigable" expresses Congress' intent to use "its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *SWANCC*, 531 U.S. at 172. By definition, actual navigable waters can be used as channels of commerce. But the wetlands in this case are not navigable nor can they be made navigable. They also have never been used for commerce either intrastate or interstate. Therefore, the regulation of the Rapanos' property is not by any measure the regulation of the use of channels of interstate commerce.

Nevertheless, Respondent argues the regulation of remote, nonnavigable wetlands falls within the channels rubric because Congress may regulate under the CWA any activity that affects the biological integrity of navigable waters as channels of interstate commerce. Opposition at 21-23. But the problem with this argument is that Congress chose not to do so.

This Court has twice held that "Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate" only those wetlands "inseparably bound up with the "waters of the United States," like the abutting marshland in *Riverside Bayview*. *SWANCC*, 531 U.S. at 167 (quoting *Riverside Bayview*, 474 U.S. at 134). Therefore, the CWA does not give Respondent authority, expressly or impliedly, to regulate wetlands that do not have this significant nexus to navigable waters. For this reason, the regulation of the remote, nonnavigable wetlands in this case cannot be sustained as a regulation of the use of channels of interstate commerce.

C. The Regulation of the Wetlands in This Case Can Only Be Sustained, If at All, as a Regulation of Activity That Substantially Affects Interstate Commerce

As noted above, the regulation of remote, nonnavigable wetlands is not a regulation of the use of channels of interstate commerce. And Respondent does not claim that the regulation of such wetlands falls under the second category of Commerce Clause activity. Therefore, the regulation of the wetlands in this case must satisfy this Court's test for substantial effects under the third category of Commerce Clause activity. *See United States v. Morrison*, 529 U.S. 598, 609 (2000).

Respondent argues that if the substantial effects category applies in this case, it is satisfied by Respondent's claim that discharges to wetlands with a hydrological connection to navigable waters "have a substantial effect, in the aggregate, on downstream navigable waters." Opposition at 24. But that assertion is not enough. Nor is a factual finding that a particular discharge will have some effect on navigable waters. To qualify as a regulation of activity that substantially affects interstate commerce, the regulation must meet this Court's four-part test in *Lopez* and *Morrison* that was detailed at length in the petition. *See* Petition at 16-25. That analysis shows that the regulation of the wetlands in this case cannot be sustained as a Commerce Clause enactment.

Application of section 404(a) of the CWA in this case utterly fails the substantial effects test because: (1) on its face, the discharge of fill material into remote, nonnavigable waters is not economic in nature; (2) section 404(a) does not have a jurisdictional requirement that ensures it will only be applied to discharges that actually affect interstate commerce; (3) this Court has found that the legislative history shows that Congress intended only to exert its commerce power over navigation; and, (4) the regulation of local discharges impermissibly intrudes on

local government. *See id. See also, Morrison*, 529 U.S. at 610-13.

Although Respondent argues the government's regulation of remote wetlands is not a substantial intrusion into local government, *see* Opposition at 24-26, this Court has found otherwise. In *SWANCC* this Court stated that permitting the Corps to claim federal jurisdiction over ponds and mudflats "would result in a significant impingement of the States' traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174.

That conclusion is borne out by the fact that there are more than 100 million acres of wetlands in the United States, an area the size of the State of California, that are potentially subject to federal control under Respondent's interpretation of the CWA. *See* Jonathan H. Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 Envtl. L. 1, 26, 52 (1999).

The intrusion into state and local land-use planning from Respondent's broad application of the CWA is therefore substantial and warrants review by this Court.

CONCLUSION

For these reasons the petition should be granted.

DATED: April, 2005.

Respectfully submitted,

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